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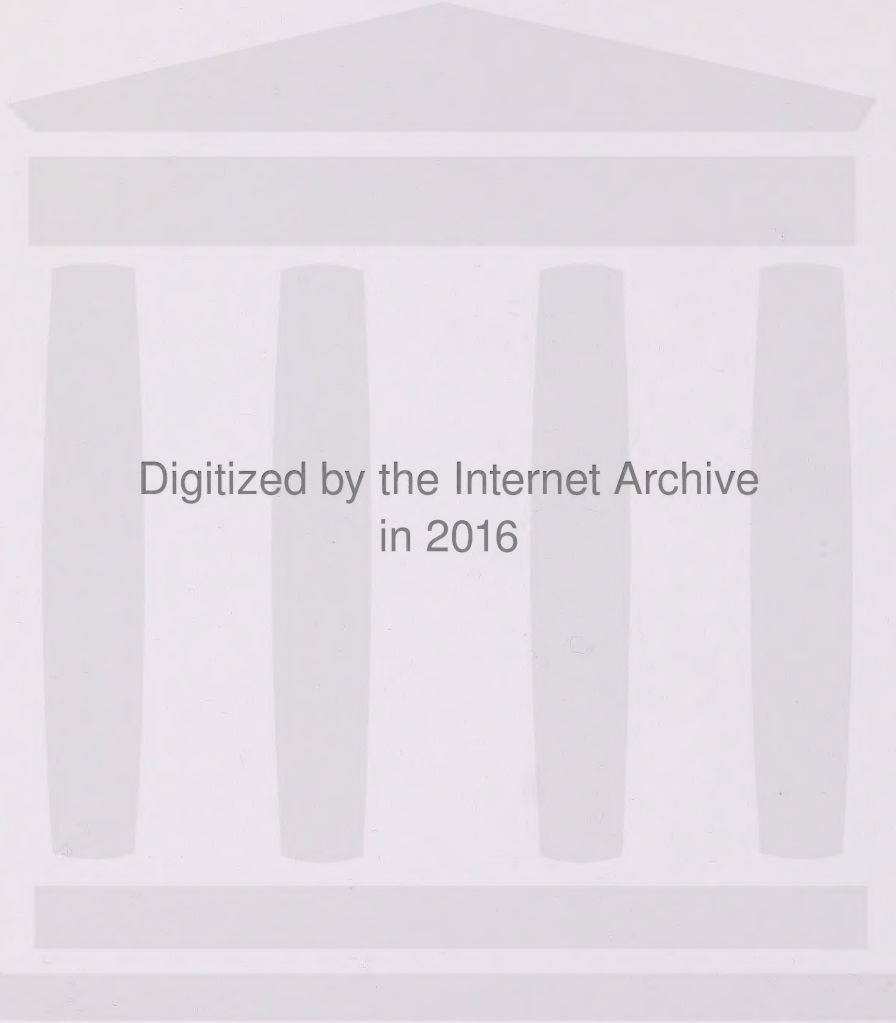
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A DISCUSSION ON THE LAW OF BUSINESS CORPORATIONS

March 1995

Alberta
MUNICIPAL AFFAIRS
Registries



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SECTION 1

1.1 INTRODUCTION

In 1982 the Business Corporations Act came into effect. It is the primary statute governing corporate in Alberta. Since its implementation significant changes have taken place in the marketplace.

To keep pace with the changes in the marketplace government is changing how it operates and is reviewing the legislation to insure that it is efficient and effective. This discussion paper will give you an overview of Alberta Registries and its "one window" service model. It will describe changes proposed by business and administration and introduce some new concepts. Most importantly, this document will ask you to give us your ideas on how the law should be changed to meet your business needs.

1.2 ALBERTA REGISTRIES

The creation of Alberta Registries consolidated five information, licensing, and registration organizations into a single entity. The primary purpose of this new organization is to improve public access to information, licensing, and registration processes through the provision of a "one window" approach to related services.

The five organizations consolidated under Alberta Registries were: Land Titles, Personal Property Registry, Corporate Registry, Vital Statistics, and Motor Vehicles.

The mandate given to Alberta Registries by the Government of Alberta is to:

- provide registration and licensing policies and services which will allow businesses and the public to operate effectively;
- improve access to information and services through a private sector delivery system which allocates the costs of delivery of services to the users; and
- work with other government departments and the business community to encourage new product development and better ways to deliver information services to Albertans through the decentralized private agent network.

Mission Statement

We guarantee quality registry information and accessible services for Albertans.

Goals and Objectives

- Achieve improvements in registry and information services by making these services more accessible to Albertans. The achievement of this goal will be measured by the number of products and services that are remotely accessible through the private agent delivery network or the direct electronic access systems.
- Improve overall budget performance through a cost reduction program (administrative streamlining, outsourcing of services, use of a private sector delivery system) and new revenues resulting from economic demand and improved access.
- Ensure that Alberta Registries maintains its reputation as a trusted custodian of data. This will be the core function of Alberta Registries, and must be achieved through effective legislation, high standards for security and privacy, and effective consultation with businesses and the public.
- Develop a delivery system which will provide community-based, private sector agent offices, where Albertans can obtain as many of their government services as possible.
- Provide Alberta businesses with direct electronic access to services where it is used within their business.
- Develop legislation and policies which meet the needs of Albertans with respect to the orderly conduct of business or public safety in such areas as: land titles; the corporate and nonprofit sectors; driver and vehicle licensing and registration; registration of security interests in personal property; and birth, death and marriage documents.
- Simplify the organizational structure and work processes to recognize the need to meet future demands at a lower cost to the taxpayer.
- Use information technology to facilitate organizational change and provide better services to Albertans.

The overall objective for Alberta Registries is to provide high quality information and registry services at the lowest possible cost to government and the public. Legislation, policies and procedures will be streamlined to make the registration and licensing system simple to use, while still being effective. The people who use the services will be expected to pay the costs of delivery.

1.3 PURPOSE OF THIS DISCUSSION PAPER

"Alberta's new economic development strategy is based on changing the roles of, and relationships between, government, the business community and individual Albertans." (*Seizing Opportunities, 1993*)

The creation of Alberta Registries was one indication of government changing the way it does business. The process of change does not stop there. The laws that regulate business must also be reviewed to ensure that they do not needlessly complicate or restrict the way Albertans do business. Nowhere is this more important than in the law of business organization.

The Business Corporations Act came into force in Alberta in 1982. We believe the Act provides a good basic model for incorporating and regulating business enterprises. However, we intend to challenge the common, historical ways of doing business in order to improve business efficiency. Your help is needed in shaping a new vision of the future that is as unregulated as possible, yet still meeting the needs of investors, businesses, customers and creditors.

In shaping a new future, it is important to look at the past, assess the present and explore future possibilities. In the first section, we will look into the past to get an understanding of the guiding principles of the existing law.

We will discuss, in the second and third sections, some options to improve the existing model. The assessment of the present focuses on recommendations for change from directors of corporations, shareholders, creditors, lawyers, accountants, and administrators of the Business Corporations Act.

The fourth section of this paper looks at new concepts for discussion. It explores the elimination of the need to report to the government on the share structure of a corporation. It discusses the option of filing all documents with Corporate Registry electronically. This section will also introduce a new way of creating a business entity aimed at simplifying the organization of small businesses.

The future of business incorporation law is not tied to the ideas presented in this document. We invite your creative and innovative ideas that will help Alberta create a more entrepreneurial environment.

1.4 BUSINESS CORPORATIONS ACT

The purpose of the Business Corporations Act is to allow the creation of a corporation and to set the rules for the operation of a corporation.

People choose to incorporate for different reasons. The basic benefits of incorporating include:

- limited liability for the members of the corporation;
- formalizing the relationship between the members; and
- creating tax benefits that may not otherwise be available.

Along with the benefits that are gained by incorporating, come some obligations. They include:

- reporting to the various governments on a wide variety of matters;
- maintaining certain records of the corporations and providing the public access to those records; and
- carrying out the affairs of the corporation according to requirements of the Business Corporations Act; this includes providing specific notices and information to the members, holding annual and special meetings, and maintaining an official address within the province.

The establishment of the rules that a corporation must comply with has evolved over many years. In this discussion paper, we challenge the need for some of them and in some situations, propose new ones. We invite comments on the existing obligations of a corporation. Do they unnecessarily impede business?

When the Business Corporations Act was enacted it replaced the Companies Act which had been in force since 1929.

In the development of the Alberta Business Corporations Act, **business efficiency** was one of the primary objectives. In meeting this objective four key elements were considered:

1. **Clarity.** The Act should be accessible and understandable.
2. **Flexibility.** Company law should facilitate legitimate business activity while balancing protection of shareholders and creditors.

3. Cost. There are inevitable costs associated with maintenance of corporate records and performance of obligations imposed by the law. While the cost of administering the law should be borne by those who benefit from incorporation, the whole process should be kept as simple and inexpensive as possible.
4. Uniformity. Uniformity between federal and Alberta law governing business corporations will make it simpler and cheaper for business to operate.

Are the key elements still valid today? Have they produced business efficiency?

Your help in identifying a vision for the future is needed. As a business person, what direction do you think the Business Corporations Act should take?

SECTION 2

EXTERNAL REQUESTS

During 1993, we solicited input on proposals to amend the Business Corporations Act. The target audience for the solicitation was corporations and selected organizations with a business orientation. In addition, we have received unsolicited requests to amend the Act. For the purposes of this discussion paper, we intend to bring forward all the comments we have received. Further comment on these suggestions is welcomed.

2.1 RESIDENT CANADIAN DEFINITION

Currently the Act requires that the majority of directors be resident Canadians. It was proposed that we amend Section 1(t)(iii) of the Act to read "a permanent resident within the meaning of the Immigration Act, 1976 (Canada) and ordinarily resident in Canada."

COMMENTS:

A Resident Canadian is defined in section 1(t) as an individual who is;

- (i) a Canadian citizen who is ordinarily resident in Canada,
- (ii) a Canadian citizen who is not ordinarily resident in Canada who is a member of a prescribed class of persons, or
- (iii) a permanent resident within the meaning of the Immigration Act (Canada) and ordinarily resident in Canada except a permanent resident who has been ordinarily resident in Canada for more than one year after the time at which he first became eligible to apply for Canadian citizenship.

We have received representation, for example, from a person who has been a permanent resident of Canada for 19 years but for personal reasons chooses not to apply for Canadian citizenship. As a result he cannot be the sole director of an Alberta corporation. **Is there a reason for this stipulation? Can the exception from (iii) be removed?**

2.2 ISSUE OF SHARES

Section 25 deals with issuing shares. It was proposed that we amend this section to allow the directors to do a share split for no apparent consideration.

Submitted Wording:

25(1.1) Notwithstanding Subsection 1, the directors may authorize a share split of all the shares of a class or of a series, by cancelling the issued and outstanding shares of that class or series and issuing a multiple number of shares of the same class or series in exchange for each previous issued and outstanding of that class or series.

COMMENTS:

There are two schools of thought respecting share splits. One is that the directors may, by special resolution, do a share split. The problem is, there is no actual consideration given for the split shares, only the implied consideration of transferring the original share back to the corporation for cancellation. The other school of thought is to do an amendment to the Articles of Incorporation pursuant to Section 167(1)(f). This process is more time consuming and does not permit the corporation to "paper" a transaction which took place earlier.

Any thoughts on this proposal?

2.3 SHARES IN SERIES

Section 27 regulates issuing shares in series. It was proposed that we amend Section 27(5) to permit series of shares to be designated in the Articles of Incorporation.

COMMENTS:

Section 27(5) prohibits the designating of a series of shares at the time of incorporation. It requires a second step of filing Articles of Amendment. **Should the incorporators be allowed to designate a series of shares at the time of incorporation?**

2.4 DIRECTOR'S LIABILITY FOR WAGES

Section 114(i) sets out a director's liability to an employee. It was proposed that we amend Section 114(1) to restrict director's liability to only six months wages.

COMMENTS:

Is Section 114 ambiguous? In subsection (1) it states a director is liable to an employee for all debts not exceeding six months wages. Subsection (2) talks about director's liability for debts for only wages. Section 111(1) of the Employment Standards Code states that notwithstanding any other Act, directors of a corporation are liable to their employees for debts for wages not exceeding six months.

Are directors responsible for all debts to an employee not exceeding six months wages or only for up to six months wages? We received a recommendation that the Act should be amended to make it consistent with the Employment Standards Code. **Your views are requested.**

2.5 SHAREHOLDERS MEETINGS

Section 126 deals with where shareholder meetings can be held. It was proposed that we amend the Act to allow shareholder meetings to be held outside Alberta.

Two options were proposed.

- a) Adopt section 93 of the Ontario BCA, or
- b) Delete Section 126(4) and add "Unless otherwise provided in the articles or an unanimous shareholders agreement" to the beginning of Section 126(1).

COMMENTS:

Section 126 of the Business Corporations Act states:

126(1) Meetings of shareholders of a corporation shall be held at the place within Alberta provided in the by-laws or, in the absence of such provision, at the place within Alberta that the directors determine.

(2) Notwithstanding subsection (1), a meeting of shareholders of a corporation may be held outside Alberta if all the shareholders entitled to vote at that meeting so agree, and a shareholder who attends a meeting of shareholders held outside Alberta is deemed to have so agreed except when he attends the meeting for the express purpose of objecting to the transaction of any business on the grounds that the meeting is not lawfully held.

(3) Subsection 3 is not applicable.

(4) Notwithstanding subsections (1) and (2), if the articles so provide, meetings of shareholders may be held outside Alberta at one or more places specified in the Articles.

Section 93 Ontario Business Corporations Act:

Place of meetings - Subject to the articles and any unanimous shareholder agreement, a meeting of shareholders of a corporation shall be held at such place in or outside Ontario as the directors determine or, in the absence of such a determination, at the place where the registered office of the corporation is located.

What problems are Alberta corporations experiencing in this area?

2.6 ARTICLES OF AMENDMENT

Section 167(1) identifies when the articles of a corporation may be amended. It was proposed that we amend this section to permit a corporation to cancel a class of shares where there are no issued or outstanding shares.

COMMENTS:

Section 167 of the Act does not contain express provisions to eliminate a class of authorized but unissued shares. To accomplish the elimination of a class of unissued shares, many corporations are using 167(1)(c) to reduce the number of authorized shares to nil, the result being that the corporation is no longer authorized to issue any shares of that class.

Is a more direct method needed?

2.7 CONSTRAINED SHARES

Section 168(2) states that a distributing corporation may by special resolution amend its articles in accordance with the regulations to constrain the issue or transfer of shares. There are no regulations to constrain the issue or transfer of shares.

COMMENTS:

Should there be? If so what matters need to be regulated?

2.8 AMALGAMATION OF PROFESSIONAL CORPORATIONS

Section 175(2) restricts a professional corporation from amalgamating. It was proposed that we amend this section to permit professional corporations to amalgamate.

COMMENTS:

Professional corporations that want to amalgamate must now convert to a regular corporation, amalgamate and then reapply to be a professional corporation. **Are these extra steps necessary?**

2.9 REVIVAL - LIMITED PURPOSE

The Business Corporations Act does not have a provision to allow a corporation to be revived for a limited time or purpose. There are situations where a corporation must be revived for a limited time or purpose.

It was proposed that we amend the Act to permit the revival of a corporation for a limited time and purpose.

COMMENTS:

Section 201 of the Act establishes the ability to revive a corporation. The effect of the revival is that the corporation is deemed to have continued in existence as if it was never dissolved. There are situations in which a corporation may need to be revived for a specific purpose or function. During the term of the revival, the corporation usually does not carry on any business. Often the party reviving the corporation is an interested third party. After the completion of this event, the corporation could be dissolved again. **Should a separate revival process be provided for these unique circumstances?**

2.10 DERIVATIVE ACTION

Section 232 deals with an application to the court for a derivative action. It was proposed that we amend this section to render the notice requirements in 232(2)(a) unnecessary in cases where all members of the board of directors are defendants in the case.

COMMENTS:

Clause (a) of subsection (2) appears to require a complainant to ask the board of directors to sue themselves before the complainant can ask the Court for leave to bring an action or intervene.

Section 232 (2)(a): no leave may be granted under subsection (1) unless the Court is satisfied that:

- a) the complainant has given reasonable notice to the directors of the corporation or its subsidiary of his intention to apply to the Court under subsection (1) if the directors of the corporation or its subsidiary do not bring, diligently prosecute, defend or discontinue the action.

2.11 EXTRA-PROVINCIAL REGISTRATION

Section 264 defines when an extra-provincial corporation is deemed to be carrying on business in Alberta. It was proposed that we amend this section to allow an extra-provincial corporation that is an executor of an estate, to hold title to real property without extra-provincially registering in Alberta.

COMMENTS:

Section 264 defines the circumstances when an extra-provincial corporation is deemed to be carrying on business in Alberta. Subsection (1)(e) says an extra-provincial corporation carries on business in Alberta if it is the owner of any estate or interest in land in Alberta. Should foreign executors be exempted from this provision? That is, an extra-provincial corporation is the executor of an estate. The sole asset of the estate in Alberta is land. To sell the land and transfer the title to the new owner, the executor must extra-provincially register in Alberta.

2.12 EXTRA-PROVINCIAL - ASSUMED NAME

When an extra-provincial corporation wanting to register in Alberta finds that its name is similar to an Alberta corporation's name, it can adopt an assumed name for use in Alberta. Section 270 sets the requirements of an assumed name. It was proposed that we amend this section to make it an offence for an extra-provincial corporation, that has adopted an assumed name, to carry on business in Alberta under its home name.

COMMENTS:

Some extra-provincial corporations must adopt an assumed name in order to register in Alberta. **Should the Business Corporations Act make it an offence for an extra-provincial corporation that adopted an assumed name, to carry on business in Alberta under its home name?**

2.13 DIVIDEND SPRINKLING

The Supreme Court of Canada rendered a judgement in the Queen v. McClung [91 D.T.C. 5001] which apparently is of considerable interest to corporations where some element of tax planning is involved. The Supreme Court held that a corporation incorporated under the Business Corporations Act (Saskatchewan) could "sprinkle" dividends to one class of shares to the exclusion of another. The question has been raised, should the Business Corporations Act (Alberta) be amended to make it clear that dividend sprinkling arrangements are allowed?

COMMENTS:

Is this an issue?

2.14 ELECTRONIC TRANSFER OF SECURITIES

The Business Corporations Act (Alberta) governs transfers of investment securities in Alberta. The provisions of the Act are based on an early version of Article 8 of the U.S. Uniform Commercial Code (UCC). It relies on the concepts of possession and delivery of the negotiable security certificate.

Expanding markets and the development of technology has made the Alberta law out of date. The Alberta Law Reform Institute has responded to this situation with a comprehensive report on this subject. The report is titled TRANSFER OF INVESTMENT SECURITIES.

Copies of the report can be obtained from:

Alberta Law Reform Institute
420 Law Centre
University of Alberta
Edmonton AB T6G 2H7
Telephone: (403) 492-5291
Fax: (403) 492-1790

Comments are requested on problems Alberta corporations are experiencing in this area.

2.15 SECTION 42 PROHIBITED FINANCIAL ASSISTANCE BY A CORPORATION

Section 42 has caused difficulties for lawyers, accountants and lenders since the Act came into force. It was intended to protect creditors and shareholders by preventing the corporation from making a loan to a director or shareholder in two situations:

1. when the corporation may not be able to meet its financial obligations as they become due, and
2. the realizable value of the corporation's assets must be greater than the aggregate of the liabilities and the stated capital of all shares.

Interpretation and application of section 42 has proven difficult. As a result, we are told some commercial transactions have been unduly inhibited.

Input on the problems this section is causing and proposed solutions are requested.

2.16 ANNUAL RETURNS

In the summer of 1993, a letter was included with the annual return forms we sent to corporations. The letter was a solicitation for input on how the Business Corporations Act could be changed to improve business efficiency. Of the responses we received the area that received the most comment was the annual return.

An evaluation of the comments did not identify a common problem. The comments covered a wide range of issues. At one end of the spectrum they requested no annual return or only filing one every three to five years. At the other end, some submitters were requesting more information.

In view of the range of responses we consulted with Andrew J. Hladyshevsky, of the law firm Cruickshank Karvellas, on the options that should be considered in evaluating this issue. Mr. Hladyshevsky is the chairman of the Corporate Registry liaison committee for the Law Society of Alberta. He presented summaries of two schools of thought from a legal practitioners point of view.

The two schools of thought can basically be summarized as follows:

I. Short Form Annual Return

This group feels that the annual returns should simply disclose continuance of registration. Accordingly, if there has been a change of directors it is not relevant because there is a separate form which is filed if there was such a change. There is no necessity to describe whether or not the corporation owns "controlled land". Similarly, there is no necessity for the directors to make any disclosure regarding whether the corporation has earned revenue or income of any kind.

From this point of view, the only issue is whether or not it is advisable to show a change in shareholding. Since this is the only publicly filed document which discloses such shareholding, most legal practitioners would agree that the shareholding changes should be evident.

Practitioners would say that for private corporations it is not intended that there be any disclosure other than that information which is made available pursuant to sections 20 and 21 of the Business Corporations Act. The statute describes how individuals can gain access to relevant information regarding the corporation by virtue of their status to the corporation. There is no necessity to duplicate at the Corporate Registry.

In the case of public corporations the practitioners would say that some sort of disclosure is required but that the current Securities Act is likely sufficient.

II. Lengthy Annual Return

These practitioners are not particularly in favour of some of the current disclosure of information, that is, the "controlled land" and revenue and income insertions in the annual return. They also believe they could likely live without a provision regarding change of directors because that is covered by another section of the statute and another document that forms part of the public record.

However, there is a class of practitioners that is extremely concerned that there are provisions in the Business Corporations Act which allow significant corporate transactions to be undertaken without there being any notice on the "public record". Their concern stems from provisions such as section 113 which deals with the liability of directors and others for certain transactions set out in subsections 113(1) and (3). The directors are jointly and severally liable to restore to the corporation any amount so paid however by virtue of subsection 113(9) an action to enforce such a liability may not be commenced after "two years from the date of the resolution authorizing the action complained of". Not all directors' resolutions are in fact accessible to the public. If a third party was wronged by one of the activities set out in section 113, when and how could such an action be commenced without any knowledge of it?

These practitioners would expand the annual return form so that some of the following questions would be answered positively or negatively:

- a) as there a purchase or redemption or other corporation's acquisition of shares?;
- b) Was a commission on sale of shares paid?;
- c) Has there been a declaration of a dividend?;
- d) Has there been financial assistance given by the corporation in connection with section 42?;
- e) Has there been a payment of an indemnity in accordance with section 119?; and
- f) Have there been any payments to shareholders in connection with section 184 or 234?

This is not an exhaustive list but clearly these practitioners feel that the documents supporting some transactions would not have to be registered but the mere noting of their occurrence would heighten the duties and responsibilities of directors under the Business Corporations Act. Also, it would provide affected third parties with remedies that would otherwise go unnoticed. This was never the Business Corporations Act's original intent.

It would require additional diligence on the part of the directors and legal advisors to review these questions on an annual basis but would provide the public with an accurate record of the nature of certain transactions which the corporation has undertaken.

These practitioners would also like this list expanded to fundamental changes, amalgamation and similar types of activity including "sale of substantially all assets of the corporation". Some would go so far as to require some form of notice of any special resolutions that are passed.

COMMENTS

In considering the best approach, you should look beyond just completing the information on your corporation's annual return. **You are encouraged to look at what information you need on corporations that you deal with. Would the ability to access certain types of information enable you to make more informed business decisions?**

Your comments are requested.

2.17 RECEIVER/RECEIVER-MANAGERS

In recent years, a Private Bill to amend the receivership provisions of the Business Corporations Act has been brought before the Legislature several times. The thrust of the Bill was to provide a simple way to appeal the way a receiver is handling his responsibilities.

The Bill proposed to give the Registrar the authority to demand that the Receiver report on the receivership and provide any account records or papers that the Registrar deems necessary. In addition, the Bill permitted the Registrar to apply to the court to do anything he believes to be in the best interest of the parties involved.

In effect, the Bill placed the Registrar between the affected parties and the Court. The purpose behind the Bill was to establish a simple and inexpensive way for an aggrieved party to seek some redress.

The proposed Bill was not approved by the Legislature. Although Section 95 of the Business Corporations Act gives any interested party the ability to apply to the court for the same remedies found in the proposed Private Bill, there is a perceived need to simplify the process.

This situation raises some questions that your input is requested on:

- **Is Section 95 too complex and expensive?**
- **Is there a simpler and less expensive process that can replace Section 95?**

- **Can the Receiver/Receiver-Manager provisions in the Business Corporations Act be repealed? With the recent introduction of the federal Bankruptcy and Insolvency Act, does the Business Corporations Act need to regulate this activity?**

SECTION 3

PROPOSALS FOR ADMINISTRATIVE AMENDMENTS

Alberta Registries has been reviewing its processes looking for more efficient and cost effective ways of doing business. We identified a number of amendments to the Act that would enable us to administer it in a more cost effective way. We also identified some amendments that should result in better quality of information being kept on our records. Our proposals are found in this section.

3.1 EXTRA-PROVINCIAL REGISTRATION OF LIMITED LIABILITY COMPANIES

The growing trend in the U.S.A. is for state legislation to be drafted to permit the creation of a new kind of entity called limited liability companies (LLC).

Recently we have received three requests to register an LLC in Alberta. We cannot find any existing legislation that will accommodate the registration.

It is our belief that any legitimate business entity should have the ability to register to do business in Alberta. To support this belief, we propose to amend the Business Corporations Act to permit the extra-provincial registration of business entities that do not fit into the scheme of existing legislation.

Your comments on this proposal are requested. Further details on the concept of LLC is included in Section 4.3.

3.2 DIRECTORS CHANGE OF ADDRESS

Section 108(1) states a notice shall be sent to the Registrar if there is a change among the directors. It does not require a director to file a change of address. We believe it should. The Act places great importance on keeping the information on directors up to date. The address of the director is important. Without a current address, a director may not receive important notices that are sent to directors.

We propose an amendment to section 108 to require the filing of a notice to change the address of a director.

3.3 NO DIRECTORS

Section 97(2) makes it mandatory for a corporation to have at least one director. Situations have arisen where all the directors of a corporation have resigned, but the business continues to operate. Currently the Registrar has no authority to intervene.

The duties and responsibilities of the directors form a large part of the law of business corporations. We believe that corporations that choose to continue to operate with no directors should lose the benefits of incorporation.

We propose to amend the Act to permit the Registrar to dissolve a corporation that does not have any directors. The dissolution would be subject to the notice provisions of Section 205.

3.4 FILING COURT ORDER - REORGANIZATION

3.4.1

Section 185(4) requires that Articles of Reorganization be filed with the Registrar after a court order has been obtained. It does not require that a copy of the court order be filed with the Registrar.

As documents filed with the Registrar are public documents, we feel that it makes sense to have all the documents relating to a corporate filing in the Registrar's file. That way public access to all the information on a corporate transaction can be obtained from one source.

We propose an amendment to the Act to require a copy of the court order to be filed with the Registrar.

3.4.2

Section 234 permits the court to make an order to amend the Articles of a corporation. Subsection (6) requires Articles of Reorganization to be filed with the Registrar, but not a copy of the court order.

As documents filed with the Registrar are public documents, we feel that all documents relating to the corporate filing should be accessible from one location.

We propose an amendment to the Act to require a copy of the court order to be filed with the Registrar.

3.5 NOTICE BY THE REGISTRAR

3.5.1

Section 247 raises the cost of government administration. Subsection (1)(b) stipulates that all notices sent to the corporation be sent by registered mail. In the case of a Notice of Intent to Dissolve, the Registrar sends notices to the registered address of the Corporation and to each director. In an attempt to keep the cost of administration of the Act under control, we have considered some options.

1. Send the Notice of Intent to Dissolve by regular mail to the registered office of the corporation and to each director.
2. Send the Notice of Intent to Dissolve by registered mail, but only send it to the registered office address.
3. Explore the use of sending the notices electronically via FAX or other electronic means.

Alberta Registries prefers option one. This notice is important. We feel it is more likely to be acted on if it is distributed to a larger audience and are recommending option one. We also feel that option three has potential. We propose to explore this option to see if we can improve and enhance the notice given to the corporation at a reasonable cost.

3.5.2

Section 247(2) states that a notice sent in accordance with subsection (1)(b) is deemed to be received unless there are reasonable grounds to believe the corporation did not receive the notice. We believe the requirement is appropriate in most situations. However, there is one situation where it contradicts the intent of the legislation.

The Registrar may dissolve a corporation that has not filed a document or notice within one year of the required filing date. To dissolve a corporation that has not filed a notice document, the Registrar must send a notice of intent to dissolve to the corporation. If this notice is returned because the corporation is no longer in business or has moved and not notified the Registrar, the notice could be deemed to be invalid. This may impede the Registrar's ability to dissolve the corporation. The result is the corporate data base will contain inaccurate and out of date information. Up to date, accurate information is needed, so the Registrar must be able to dissolve corporations that do not report to him, as required by the Act.

We propose an exemption for the Registrar where the Notice of Intent to Dissolve is returned as undeliverable.

3.6 PAYMENT OF FEES

The Registrar will accept cash, cheque, money order, VISA or MasterCard as a method of payment for the prescribed fees. On occasion a service is paid for by cheque and the cheque is returned NSF. If normal collection practices are unsuccessful, collection of the debt is unlikely. In these situations the benefits of registration are obtained without payment of the prescribed fee.

It is proposed to permit the Registrar to dissolve a corporation that has received a prescribed service but has not paid the fee. The dissolution would be subject to the notice requirements of Section 205.

SECTION 4

NEW CONCEPTS

4.1 SHARE STRUCTURE

Over the last few years, most people in business and in government have had to look for more efficient and cost effective ways of doing business. Alberta Registries has recognized this fact.

In facing this challenge, one area that has been reviewed is the share structure of a corporation. Currently at the time of incorporation, a corporation must disclose the classes and any maximum number of shares the corporation can issue. In addition, anytime an amendment is made to this information, supporting documentation must be sent to the Registrar.

The Act is very specific on how a corporation may set up its share structure and the process that must be met to change it. On top of this, the legislation does not consider an amendment valid until it is filed with the Registrar.

The process of sending the documentation to the Registrar, having it validated and a certificate issued is time consuming for both the business and the Registrar.

Does the information on the share structure and any amendments to the share structure need to be sent to the Registrar for validation?

The existing process makes the Registrar's role that of a "double checker". The Act sets out the requirements corporations must meet to establish or amend it's share structure and the Registrar confirms that they did it correctly.

Should the onus for correctly establishing or amending share structure be placed with the corporation?

Under this method of doing business, the corporation would be responsible for keeping its own records. A defined class of people could likely be given the ability to access the corporate records.

For the corporation, this scheme allows them to quickly react to their business needs.

For people and organizations relying on the Registrar's certificate and records, they will need to rethink how they do their business.

This concept is a step from the norm. It has an impact on the corporation, persons and businesses interested in dealing with a corporation, and government departments. We request all interested parties to consider the concept and provide us with your comments.

4.2 ELECTRONIC FILING

The law of business is heavily dependent on the collection and management of information. Predominantly, this information is recorded and stored on paper. As we have moved into the age of electronic communication, we have started to convert a lot of the information from paper to some form of electronic storage.

Now is the time to consider the next step and do away with the need to record this information on paper. The convenience and speed of creating, filing and retrieving information electronically offers benefits to both government and business.

Currently, all documents that must be filed under the Business Corporations Act must be on paper and signed.

The questions that need to be explored are:

- Do mandatory filings need to be on paper?**
- Do the filings need a signature?**
- Can the information required to be filed, be submitted in an electronic form?**

An example of the concept that we would like to explore is:

- a) incorporation documentation is prepared on a computer,
- b) information is electronically sent to Alberta Registries,
- c) after validation by Alberta Registries, confirmation is electronically transmitted to the sender, and
- d) Alberta Registries would maintain the information in its electronic corporate registry file.

The public would be able to obtain a search of the complete file from a computer terminal.

Electronic filing offers a substantial benefit in the administration of the law and we believe that there are significant benefits for corporations.

Before we move in this direction, we want your feedback on this concept. Will it allow you to be more efficient? Are there any exposures or legal impediments? What legal or process changes would be needed in order for this to occur?

4.3 NEW BUSINESS ENTITY

In the United States, there is a growing popularity in a new type of business entity. This new entity is called a "Limited Liability Company" (LLC). The primary attraction to this entity in the U.S. is that it has some tax advantages over corporations. Although this tax advantage may not be available in Canada, some of the unique characteristics of this business entity are attractive.

Characteristics of a Limited Liability Company:

- a limited liability company is usually defined as "an entity that is an unincorporated association",
- hybrid of a corporation and partnership,
- must have two or more members,
- the liability of all members is limited,
- it has a legal existence separate from the members, and
- the life of an LLC is limited to a fixed period.

Formation of a Limited Liability Company

An LLC is formed by filing Articles of Organization which disclose:

- (i) the name of the LLC (subject to availability),
- (ii) the date of dissolution (its existence is not perpetual),
- (iii) its purpose (may be for any lawful purpose),
- (iv) street address of its principle office, and the name and street addresses of its registered attorney, and
- (v) any other provisions the members choose to set forth.

The Articles do not disclose anything of the LLCs internal governance. These matters are addressed by an "operating agreement".

Operating Agreement

The operating agreement is the fundamental contract between the members and managers. It generally combines the contents of both partnership agreements and corporate law. Like a partnership agreement, the operating agreement will set forth the members' capital contribution, their allocations of income, gains, deductions, and credits, and their rights to distribution. It will cover the admission of additional members and the withdrawal of existing members. Like corporate bylaws, the operating agreement will set forth the authority of the managers (a manager is equivalent to a corporate director), the managers' qualifications, number and tenure, their right to indemnity and any limitations on liability. It will set out the members voting rights and the procedure for the call and conduct of meetings. It will address transfers, assignments, and withdrawals of interest. The well-drafted operating agreement must be a comprehensive contract.

Advantages

The obvious advantage to creating an LLC is that the members can tailor the operating agreement to suit their individual needs. This offers the members tremendous flexibility over their internal governance. This allows the members to choose their own procedures for matters like calling of meetings, voting, and quorums.

Application in Alberta

Limited Liability Company law as it is known in the U.S., may not be ideal for Alberta. However, the concept of creating a new type of business entity may be beneficial in the Alberta marketplace.

In Alberta, the majority of corporations formed are closely held small businesses. The flexibility and reduced regulation this type of business organization offers, makes it particularly attractive to small businesses. This structure may also be attractive to joint ventures in oil and gas, mining, and real estate developments.

Does Alberta need to look for additional ways of creating and managing business entities?

Your input is requested.

4.4 LIMITED LIABILITY PARTNERSHIP

Alberta has long had legislation to accommodate the registration of Partnerships. Changes in how business is done and with whom, has brought the introduction of a new type of partnership in some states in the U.S. This new way of organizing a partnership is called "Limited Liability Partnership" (LLP).

The principal difference between general partnerships and LLPs relates to partner liability.

- In a traditional general partnership, the partners are personally liable for all the obligations of the partnership and for all the damages caused by other partners acting in the scope of partnership business.
- In the LLP, a partner is not personally liable for partnership obligations arising from the negligence, wrongdoing or misconduct of other partners or of employees of the partnership.
- The LLP partner, however, remains personally liable for:
 - all other types of partnership obligations
 - his/her own negligence, wrongdoing and misconduct
 - the negligence, wrongdoing and misconduct of other partners and of employees under his/her supervision and control.
- The LLP thus protects "innocent" partners from personal liability for the negligence of other partners, but not from the commercial liabilities of the partnership (e.g.,: loans, leases, trade debt, taxes, wages, etc.)

LLP laws do not affect the liability of the partnership itself in regards to partnership assets and insurance. In addition, it is taxed in the same manner as a general partnership.

This new type of partnership organization appears to be suited to large professional partnerships. However, it may also meet the needs of other types of business associations.

Would an additional form of partnership organization benefit Alberta business?

4.5 JOINT AND SEVERAL LIABILITY VS. PROPORTIONATE LIABILITY

The accounting profession has raised a concern about their exposure to liability claims. Worldwide there is an increase in the number and amount of claims arising from business bankruptcies. The common law principal of joint and several liability can result in a defendant in a law suit being held liable for the full amount of losses suffered by a plaintiff, **even when other parties are mainly responsible for the losses.**

The Institute of Chartered Accountants of Alberta advise that the number of claims and settlements against auditors in recent years has led to the virtual collapse of the international commercial liability insurance market. If unchecked, this trend will result in less public protection, since insurance will not be available.

An equitable and practical solution is proportionate liability. Under proportionate liability, the court would allocate to each defendant the share or portion of the losses they were responsible for. Defendants in a lawsuit would continue to be fully responsible for their own actions. However, they would not be held liable for the actions of others.

A fair and equitable legal environment is important to the growth of Alberta's economy.

Would proportionate liability enhance the environment for business formation and financing in Alberta?

LIMITED SCOPE

The allocation of liability among defendants can also take place on matters that do not relate to a business transaction, such as accidents and personal injuries. As the scope of this discussion paper focuses on the law of business, discussion on assessment of liability is restricted to business transactions.

SECTION 5

5.1 RESPONSES

Your comments on the proposals and concepts outlined in this discussion paper are needed. Any ideas on how the legislation can be improved are encouraged.

Please address your comments to:

Bob Foord
Alberta Registries
Box 1007, Main Post Office
Edmonton, Alberta
T5J 4W6
Fax: (403) 422-1091

Comments should be sent by **May 15, 1995**

5.2 EVALUATION PROCESS

On completion of this stage of the consultation process, all the proposals will be recorded. A group of knowledgeable representatives from industry and government will be assembled to evaluate all the proposals and concepts. They will give advice on the proposed changes and new concepts.

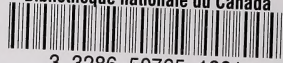
5.3 PUBLIC CONSULTATION AND TENTATIVE LEGISLATIVE TIMETABLE

Using the information received from the consultation process, a Bill will be drafted to amend the Business Corporations Act. Tabling of the Bill will be dependent on the government's legislative schedule.

5.4 CONCLUSION

Thank you to the many people who have already provided input on changes to the Business Corporations Act, and to those who are just now giving us your ideas. Your leadership in directing the change of this legislation is important.

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